71-1691

No.

FILED

JUN 26 1972

MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1972

WILLIAM J. RASMUSSEN,
d/b/a SARIVAL GUERNSEY FARMS,
Petitioner,

v.

CLIFFORD HARDIN, Secretary of Agriculture of the United States,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOHN B. CARROLL
918 Onondaga Savings Bank Bldg.
Syracuse, New York 13202
Attorney for Petitioner

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the HONORABLE WARREN E. BURGER, Chief Justice of the Supreme Court of the United States and Associate Justices of the Supreme Court of the United States:

The Petitioner, William J. Rasmussen, d/b/a Sarival Guernsey Farms, hereby petitions for a Writ of Certiorari to review a Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case, and in support thereof does state as follows:

I
OPINIONS DELIVERED IN COURTS BELOW

The United States District Court for the District of Arizona rendered an unreported opinion, a copy of which is appended to this Petition, (Appendix A, Page 1a).

The Ninth Circuit rendered an opinion not yet reported, a copy of which is attached hereto, (Appendix B, Page 1a).

II
JURISDICTIONAL STATEMENT

The date of the Judgment of the Circuit Court is March 29, 1972, and the time of its entry is March 29, 1972.

The statutory provision believed to confer jurisdiction on this Court to review the Judgment in question is section 1254 of Title 28 of the United States Code.

III
QUESTIONS PRESENTED

1. Does a handler otherwise exempted from the Agricultural Adjustment Act of 1937, as amended, faced with a taxing assessment order equal to 40% of the sales price of his product, promulgated after a hearing and final decision by the Secretary of Agriculture, taxing and assessing non-fat milk powder purchased by the handler from Minnesota, Wisconsin and Mississippi upon its entry into Phoenix, Arizona, which order is clearly ultra vires and in violation of express Congressional restriction that the Secretary shall not "in any manner limit" the marketing of milk products (7 USC 608c 5 (G), have recourse to the Courts on the clear legal issue of an ultra vires action, without prior recourse to Administrative proceedings before the Secretary.

2. Is the Secretary's legal justification for a taxing assessment upon non-fat milk powder used for fluid purposes, i.e., that it is assessed upon the use to which the powder is put and not upon its purchase, legally sustainable in view of the fact that the taxing assessment falls upon the purchaser.

IV
STATUTES AND REGULATIONS INVOLVED

Statutes:

Title 7, Section 608a (8), United States Code

Title 7, Section 608c 5 (G), United States Code

Title 7, Section 608 (c) 15 (A) and (B), United States Code

Regulations:

7 C.F.R., Section 900.8

7 C.F.R., Section 900.16

34 FR 16881

34 FR 17428

V
STATEMENT

The plaintiff is a milk farmer, who produces and sells his own milk to retail grocery stores, rather than to dealers. This method of operation has exempted the plaintiff from a marketing order of the Secretary of Agriculture governing prices of raw milk sold by producers to dealers, for subsequent resale in and about Phoenix and Tuscon, Arizona. (Appendix D, Page 16a).

In 1965, the plaintiff began the manufacture of "GO", a food drink consisting of non-fat dried milk powder, vegetable fat, and vitamins A and D. None of the aforesaid ingredients are produced in Arizona, but rather originate from States outside the Secretary's regulatory jurisdiction. (Appendix D, Page 4a).

Upon manufacture "GO" is then wholesaled to independent grocers in the Phoenix area, who in turn retail this product to consumers. From the date of its initial marketing to December 1, 1969, "GO" was not regulated by the Secretary of Agriculture in any program, and accordingly no assessments were necessary on account of its manufacture or sale.

However, in response to the efforts of the United Dairymen of Arizona, a competitor of the plaintiff, the Secretary of Agriculture scheduled a hearing in Phoenix, Arizona for February 7, 1967, to consider a proposal that a price fixing order be utilized in order to levy a compensatory tax or assessment upon "GO". (Appendix D, Page 16a). The proceeds of such tax are then distributed to fresh milk interests in order to compensate them for an alleged loss of fluid milk sales resulting from the entry of "GO" and similar products on the milk market. (Appendix D, Page 23a).

After evidence had been presented in hearing, briefs were submitted by the respective parties, and the matter was before the Department of Agriculture.

A Recommended Decision was subsequently issued on October 9, 1967, which re-classified "GO" as a Class I fresh milk product, and also eliminated exemptions for those farmers who, like the plaintiff, brought in non-fat milk powder from other marketing areas. (32 F.R. 14232).

After filing exceptions to the Recommended Decision, the plaintiff learned that the Secretary was holding informal ex parte conferences with producer groups from markets both within and without Arizona. Since this occurred while the matter was sub judice the Department of Agriculture, but before a final decision had been rendered, the plaintiff voiced strong objection to the Secretary over these conferences. (Appendix D, Page 11a).

The Secretary's next action was to reopen the prior hearing, and broaden the issues to cover over 80 marketing orders in the United States. This hearing was scheduled for Memphis Tennessee, some 1500 miles from the plaintiff's residence. (Appendix D, Page 5a).

The plaintiff appeared at this hearing, objected to the reopening place, the time of the hearing, and moved for its adjournment and/or its dismissal. All requests were summarily denied by the hearing officer whose action was later upheld by the Secretary in the final order.

Thereafter the Secretary issued a second Recommended Decision for all milk marketing orders of the United States including Central Arizona.

The plaintiff excepted to the aforesaid Recommended Decision, again contested the legality of the rulings of the hearing officer denying the plaintiff's motions for dismissal or adjournment to Phoenix, Arizona, and the plaintiff duly filed exceptions thereto.

Thereafter and on the 12th day of October, 1969 the Secretary promulgated the contested order herein, made effective December 1, 1970 in a later order.

Prior to the effective date of the regulation the plaintiff moved in the District Court of Arizona for a stay, which motion was granted. The Secretary moved to dismiss the plaintiff's complaint before answer, and to dissolve the stay. On argument the stay was dissolved, and the action dismissed for failure to exhaust administrative remedies.

ARGUMENT

Title 7 USC 608c 5 (G) provides:

> (G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit *or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.* (Emphasis supplied).

The Secretary defends his taxing assessment on the grounds that he is not taxing the powder itself but only the product containing the powder; therefore section 5(G) does not apply.

Thus at 34 FR 16884, 16885 the Secretary stated:

> The exceptions overlook the fact that the payment applies only if the handler converts the nonfluid product to a fluid form and use. *The payment is not required on non fat dry milk, per se, and therefore does not have the effect of limiting its marketing as a product of milk within the meaning of 608c(5)(g) of the Act.* (Emphasis Supplied).

This position presents a clear legal issue which is determinative of the case.

Since the taxing assessment is clearly a limitation 1/, the only

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1/ At Appendix D, page 25a of the Complaint, Mr. Smilow, former employee of the Milk Market Administrator's office computed the cost of the contested regulation, had it been in effect in the year 1968 and 1969 to November 1, 1969.

These computations were not contested.

These figures conclusively show that had the regulation been in effect in 1968 the plaintiff would have been required to pay $113,907.60 on his "GO" SALES AND $49,197.91 ON HIS OWN HERD PRODUCTION (by reason of the loss of his exempt status under the Act caused by his handling of non-fat milk powder used in "GO" manufacture); that for 1969 the plaintiff would have been required to pay $64,959.92 on his "GO" sales and $55,409.91 on his own herd production. These amounts exceed 40% of the retail price. (Appendix D, Page 17a), and are in excess of the profit margin by a large amount. (Appendix D, Pages 17a, 18a). The effect of the regulation is to force "GO" off the market. (Appendix D, Page 18a).

question remaining is whether it is saved from Section 5(G) by the fact that it is levied on the resulting product and not on the powder itself.

Under a statute stating the Secretary cannot "in any manner" limit the marketing of manufactured products such as powder, it seems certain that indirect restraints as well as direct restraints are intended to be encompassed within the prohibition.

It is difficult to see how the Secretary's distinction can be asserted in good faith and in any event the ultra vires nature of his act is clear.

Further this Court has recognized the unity between the Secretary and the industry, with the attendant possibilities for monopoly in violation of Section 5 (G), and solemnly warned the Secretary that he is fully bound by the full scope of language of Section 5 (G) 2/ and that he does not have broad dispensing powers. 3/

2/Clear directions were given to the Secretary based on the legislative history of Section 5(G) in the case of *Lehigh Valley Coop. Farmers, Inc.* vs. *United States*, 370 U.S. 93, 82 S.Ct. 1168 (1962) commencing at page 1177 to 1180.

3/ It was stated by this Court in the case of *Zuber* vs. *Allen*, 396 U.S. 168, 90 S.Ct. 314, (1969), in reviewing the legislative history of the Agricultural Adjustment Act of 1937 (7 USC §608(c)(5) at page 324:

> It is clear that Congress was not conferring untrammeled discretion on the Secretary and authorizing him to proceed in a vacuum. That was the very evil condemned by the courts which the 1935 Amendment sought to eradicate. See *Brennan* vs. *Stark*, 342 U.S. 451, 72 S.Ct. 433 (1952).

And the Court stated on page 323:

> The statute before us does not contain a mandate phrased in broad and permissive terms....The prefatory discussion in the House Report emphasizes the Congressional purpose to confine the boundaries of the Secretary's delegated authority. In these circumstances an administrator does not have 'broad dispensing power'. *The Addison* vs. *Holly Hill Fruit Products Company*, 322 U.S. 607, 617, 64 S.Ct. 1215, 1221, 88 L.Ed. 1488, 153 ALR. 1007.

In this posture similar ultra vires issues have on occasion been treated in the first instance by the Courts without recourse to an administrative agency. 4/

In the case of *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 1524, (1967) this Court reviewed the law stating:

> Also, we recognize the force of the petitioner's contention that the issue as they have framed it presents a purely legal question: whether the regulation is totally beyond the agency's power under the statute, the type of legal issue that courts have occasionally dealt with without requiring a specific attempt at enforcement, *Columbia Broadcasting System* vs. *The United States*, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563; cf. *Pierce* vs. *Society of Sisters*, 286 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, or exhaustion of administrative remedies *Allen* vs. *Grand Central Aircraft Company*, 347 U.S. 535, 74 S.Ct. 745, 98 L.Ed. 933; *Skinner & Eddy Corporation* vs. *United States*, 249 U.S. 557, 39 S.Ct. 375, 68 L.Ed. 772.

In *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 39 S.Ct. 375, (quoted with approval in *Toilet Goods Association* v. *Gardner* (supra), this Court stated at page 562:

> First. The defendants contend that the District Court did not have jurisdiction of the subject-matter of this suit; because orders entered in a fourth section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under §§13 and 15 of the Act to Regulate Commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the

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4/ See *Leedom* v. *Kyne*, 358 U.S. 184, 188, 189, 79 S.Ct. 180, 183-184. See also Selective Service matters where "blatantly lawless" acts have been granted court access before agency review *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 89 S.Ct. 414), and review when all steps have not been exhausted *Craycroft* v. *Ferrall*, 397 U.S. 335, 90 S.Ct. 1152; *McKart* v. *United States*, 395 U.S. 185, 89 S.Ct. 1951.

Commission, *Loomis* v. *Lehigh Valley R.R. Co.*, 240 U.S. 43, 50; *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U.S. 138, 146; *The Minnesota Rate Cases*, 230 U.S. 352, 419; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U.S. 506; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U.S. 481; and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law, *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 482; *Pennsylvania Co.* v. *United States*, 236 U.S. 351, 361; *Los Angeles Switching Case*, 234 U.S. 294, 311; *Kansas City Southern Ry. Co.* v. *United States*, 231 U.S. 423,440; *Proctor & Gamble Co.* v. *United States*, 225 U.S. 282, 297-298; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U.S. 541. But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. THE CONTENTION IS THAT THE COMMISSION HAS EXCEEDED ITS STATUTORY POWERS; AND THAT, HENCE, THE ORDER IS VOID. IN SUCH A CASE THE COURTS HAVE JURISDICTION OF SUITS TO ENJOIN THE ENFORCEMENT OF AN ORDER, EVEN IF THE PLAINTIFF HAS NOT ATTEMPTED TO SECURE REDRESS IN A PROCEEDING BEFORE THE COMMISSION. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 49; *Louisiana & Pacific Ry. Co.* v. *United States*, 209 Fed. Rep. 244, 251; *Atlantic Coast Line R. R. Co.* v. *Interstate Commerce Commission*, 149 Fed. Rep. 449, 451. *The Sacramento Case, supra*, was a case of this character. Compare *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U.S. 88, 92; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433. The District Court properly assumed jurisdiction of this suit. (Emphasis supplied)

Recently in *Barlow* v. *Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 837, your honors held:

On the contrary, since the only or principal dispute relates to the meaning of the statutory term, a controversy must ultimately be resolved not on the basis of matters within the special competence of the Secretary, but by a judicial application of the cannons of statutory construction. See *Texas Gas Transmission Corp.* vs. *Shell Oil Company*, 363 U.S. 263, 268-270. 'The role of the Courts should in particular be viewed hospitably where — the questions sought

> to be reviewed do not significantly engage the agency's expertise — where the only or principal dispute relates to the meaning of the statutory term — the controversy presents issues on which Courts and not the administrators are relatively more expert.' *Hardin* vs. *Kentucky Utilities Company*. 390 U.S. 1. 14 (Harlan J. dissenting)

On the aforesaid principles the Courthouse should have been opened and an injunction issued for the plaintiff whose very existence depended upon speedy resolution of the legal issue. (Appendix D, Page 18a).

A similar direction was given by this Court in favor of a similarly situated plaintiff whose business relations were threatened in *Gardner* v. *Toilet Goods Association*, 387 U.S. 169, 87 S.Ct. 1520 at pages 1529-1530.

The lower court and the government maintain that there is something about the Act involved here which indicates Congress intended to restrict these principles of direct court access.

We would like to point out that the Agricultural Adjustment Act itself in its Administrative Relief provisions at Section 15A, provides that handlers "may" file for administrative relief (7 USC § 608c 15 A). It does not say 'shall", and "shall" is used elsewhere in that section. The Act also has a savings clause (7 USC § 608a (8), relied on by this Court in *Stark v. Wickhard*, 321 U.S. 288, 64 S.Ct. 559, to allow standing for producers who were adversely affected by what the Court called a sales tax.

In that case the Court said:

> The Act bears on its face the intent to submit many questions arising under its administration to judicial review. §§8a(6), 8c(15)(A) and (B). It specifically states that the remedies specifically provided in §8a are to be in addition to any remedies now existing at law or equity. §8a(8). This Court has heretofore construed the Act to grant handlers judicial relief *in addition to* the statutory review specifically provided by §8c(15). On complaint by the United States, the handler was permitted by way of defense to raise issues of a want of statutory authority to impose provisions on handlers which directly affect such handlers. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 560, 561, 59 S.Ct. 993, 1006, 1007, 83 L.Ed. 1446. In the *Rock Royal* case the Government had contended that the handlers had no legal standing in the suit for enforcement to attack provisions of the order relating to handlers. While we upheld the contention of the Government as to the lack of standing of handlers to object to the operation of the producer settlement fund on the ground that the handlers had no "financial interest" in that fund, *we recognized the standing of a proprietary handler to question the alleged discrimination shown in favor of the co-operative handlers.* (emphasis supplied)

This Court recently had occasion to reaffirm the above construction in *Zuber* v. *Allen*, 396 U.S. 168, 90 S.Ct. 314, decided December 9, 1969. At page 327 of the official opinion the Court stated:

The narrow reach of our *Rock Royal* holding was recognized in *Stark* v. *Wickard*, 321 U.S. 288, where we noted that *Rock Royal* held the handlers without standing "to object to the operations of the Producer Settlement Fund." 321 U.S. at 308. *EXCEPT AS IT AFFECTED HANDLERS*. The Court in *Rock Royal* went on to reject *Rock Royal's* contention that the payments placed those *HANDLERS* without customers in the nearby counties at a competitive disadvantage. 5/ (emphasis supplied)

5/ In view of the holding in *Zuber* v. *Allen* (supra) that *Rock Royal* (supra) allowed standing to raise the issue of want of authority directly without exhausting administrative remedies, the case of *United States* v. *Ruzicka*, 329 U.S. 287, 67 S.Ct. 207 (1946) disallowing the raising of defenses in an enforcement proceeding, is confined to the issues there involved, i.e. fact, not legal issues. There the sole issue before that Court was a fact issue. See page 289, 208, where the Court states:

> By their Answer the Ruzickas justified their failure to pay, chiefly on the ground that the demand was based upon faulty inspection of their accounts and improper tests of their milk and milk products.

The Court continued:

> Thus the question before us is whether a handler may resist a claim against him by the Secretary of Agriculture, made *according to the procedure defined in the Act*, without previously having sought to challenge the claim in a proceeding, also defined in the Act, before the Secretary of Agriculture. (Emphasis supplied).

CONCLUSION

Certiorari is necessary, both to settle the question of the applicability of the exceptions to the general principles of exhaustion to the Agricultural Adjustment Act of 1937, as amended, and in the interests of justice, to spare the plaintiff from more years of delay and expense in resolution of a clear legal issue on which this Court has clearly pointed the way, and in which the Secretary has been defiant of Congress and this Court.

Respectfully submitted,

John B. Carroll
Attorney for Petitioner

June 1972

Appendix A — Opinion and Order.

[For full text — See Appendix A attached to Petition, Re: Kresse v. Hardin at page 1a thru 12a].

Appendix B — Decision.

[For full text — See Appendix B attached to Petition, Re: Kresse v. Hardin at page 13a thru 21a].

Appendix C — Statutes and Regulations.

[For full text — See Appendix C attached to Petition Re: Kresse v. Hardin at page 22a thru 36a].

Appendix D — Complaint.

STOCKTON & HILL
507 Security Building
Phoenix, Arizona 85004

and

HILL & SAVOY
512 Arizona Bank Building
Phoenix, Arizona 85003

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

WILLIAM J. RASMUSSEN, d/b/a SARIVAL GUERNSEY FARMS,

Plaintiff,

vs.

CLIFFORD HARDIN, Secretary of Agriculture of the United States,

Defendant.

NO. 69 495

COMPLAINT

NOW COMES the Plaintiff for a complaint to the Court against the Defendant and does now allege as follows:

JURISDICTION AND VENUE

I

The Plaintiff is a resident of the State of Arizona, and has done business since 1962 under the name and style of Sarival Guernsey Farms.

II

That the Defendant, Clifford Hardin, is Secretary of Agriculture of the United States of America with official residence in Washington, D. C. and at all times hereinafter alleged was acting in his official capacity.

III

This suit concerns the Common Law rights and the United States Constitutional and Federal statutory rights of the Plaintiff

and, specifically and without limitation, the Fifth Amendment to the Constitution of the United States; the jurisdiction of the Defendant under Title 7 USC, Sec. 608c et seq. and duties provided for at Title 5 USC concerning administrative hearings and decisions as more particularly set forth hereinafter.

IV

The Jurisdiction and Venue of this suit is based upon the inherent and statutory power of District and Appellate Courts to sit in equity to protect the aforesaid rights, and further pursuant to Title 28 USC Secs. 1331, 1337, 1391, 1651, 2201 and 2282 and such other provisions as may be made by law including, but not limited to, those set forth in the Administrative Procedure Act, Chapter 7, Title 5 USC.

V

That there is now existing between the parties an actual and justiciable controversy as to the law to be applied to the Plaintiff's claim, in respect of which the Plaintiff needs and requires a declaration of his rights by this Court and further order for appropriate protection and enforcement of his rights by stay, mandatory and restraining orders against the Secretary and/or the enforcement of the statute.

STANDING AND RIPENESS:

VI

The Plaintiff, William J. Rasmussen, doing business as Sarival Guernsey Farms, of Glendale, Arizona, manufactures and sells "GO" to independent stores located in the State of Arizona only, principally in Phoenix, Arizona. These stores in turn resell "GO" to the ultimate consumers. The dollar value of the sales of "GO" has been in excess of $296,000.00 per annum, but substantially less thus far in the year 1969. These commercial activities have been without imposition of penalty or assessment by the Defendant at any stage of marketing for approximately four years.

Appendix D — Complaint.

VII

"GO" is now manufactured as follows: Manufactured, non-fat dried milk powder is purchased from States other than Arizona, local Arizona water is mixed with that powder, a fat, originating wholly from vegetables, is added, together with mono and diglycerides and beta carotene and vitamins A and D. No milk produced in or for Arizona, and no vegetable fat or other ingredients produced in Arizona are used in the product. A product "Chocolate Flavored Beverage" is also made as a chocolate drink consisting of the "GO" ingredients to which chocolate, sugar and stabilizer are added, and vitamins omitted.

VIII

The manufacturer of "GO", Sarival, also produces, processes and markets at retail/wholesale fresh milk produced by his own cows in and about Phoenix, Arizona, and he is presently an exempt producer-handler under the Central Arizona Federal Milk Marketing Order. (7 CFR 1131).

IX

Pursuant to Title 7 USC 608c 5, 7, the Defendant has issued a Final Decision (34 FR 16548, No. 199 - Thursday, October 16, 1969) attached hereto as Exhibit A, and Decision on Proposed Amendments to Tentative Marketing Agreements and Orders, Milk in Memphis, Tenn and Certain Other Marketing Areas, (34 FR 16881, No. 201 - Saturday, October 18, 1969), attached hereto as Exhibit A1, and by said Exhibit A and Exhibit A1 the said Defendant has exercised jurisdiction over and claimed the power to regulate and levy a compensatory tax or penalty assessment upon the manufacture and sale of "GO" by Sarival. The rate of payment is calculated at the volume of such sales times the dollar difference between the fluid and surplus prices of such order which in 1968 on an annual average would have amounted to $.10 per half gallon of "GO". The Defendant did further exempt from assessment the fresh milk sales of Sarival on condition that

he not manufacture or sell "GO", as he is presently doing, on pain of violation of which sums of money would be due. In 1968 these monies would have amounted to $.05 per half gallon of "GO" sales. In total in 1968 the Final Decision levies order costs of $.15 per one-half gallon of "GO" and does not recognize other market costs of approximately $.02 per half gallon of "GO". (Exhibits C and D).

X

The Defendant will distribute the aforesaid monies directly to co-operatives, milk dealers and milk producing farmers serving the Central Arizona area, who neither manufactured, handled nor produced "GO" nor any of its ingredients.

XI

No benefit is derived from payments on account of "GO" and only detriment results therefrom as appears from Exhibits C and D attached.

XII

The Defendant, aside from the Final Order terms complained of, has more favorably regulated other filled milk products made from fresh Arizona skim milk as more particularly appears by Exhibits C and D. The discrimination against "GO" as compared to fresh Arizona skim milk products is approximately $.13 per half gallon of "GO" in 1969.

XIII

The Defendant has denied your Plaintiff and his witnesses who supported the Plaintiff's position the right to be heard at a re-opened hearing at the place of his residence, Phoenix, Arizona, and did schedule re-opened hearings on the subject of "GO" at Memphis, Tennessee and refused prior to and after convening the said hearing to adjourn to Arizona, and thereafter closed the hearing, and again denied such adjournment to Arizona after further request by brief and exception, and promulgated the aforesaid Final Decision denying such request. No reason has been assigned for

such refusal at any time.

XIV

Two Secretaries of Agriculture have proposed to exert such jurisdiction over "GO" on three occasions over a period of years. The construction of the Secretary and the Department as to the extent of their legal and jurisdictional power over "GO" has therefor been firmly established.

XV

The Plaintiff has elected to exercise his rights to commence this proceeding rather than to file for Administrative review pursuant to 7 USC 608 (15) (A) because the case raises fundamental questions of statutory construction and Constitutional issues which this procedure will expedite and no effective purpose can be served by delay of the issue which will seriously and irreparably injure the Plaintiff and the public.

Further, the Plaintiff can not obtain Declarative relief on the questions involving "GO" through the Administrative process and will, if relief herein is denied, be forced to lose the right to make "GO" without a tribunal in which to present his case, and in order to obtain review he, the grocers and consumers will be forced to suffer the irreparable damage alleged herein. (See Exhibits B, C and D).

XVI

There is no need or necessity for the immediate imposition of such tax and penalty assessment pendente lite, as is well illustrated by the lapse of approximately three years since the proposal was first published and hearing called, all without actual imposition of the tax or penalty.

The attached affidavits, at Exhibits B, C and D, make it plain that the aforesaid tax or penalty assessment will, if effectuated, inflict irreparable injury for which no practical redress is available, should the Plaintiff prevail at a later point in time.

Appendix D — Complaint.

XVII

In addition, the Defendant has claimed to possess and has actually exercised the right to convene a national hearing, and promulgate the Final Order and Decision at 34 FR 16548 on evidence of marketing conditions in areas other than Arizona in spite of Title 7 USC 608c (11), which favors regional milk marketing regulations.

XVIII

MATTERS IN CONTROVERSY

The Plaintiff maintains he possesses the rights alleged hereafter to be in controversy.

A. CONSTITUTIONAL MATTERS

1. Is the Plaintiff entitled to due process in the formulation of a Final Decision pursuant to 7 USC 608c and, if so, was such right violated by the procedure followed in formulating the Decision at 34 FR 16548?

2. Is the Plaintiff entitled to equal regulation of products such as "GO" made from out of state non-fat milk powder, with that regulation given fresh Arizona skim milk produced for Central Arizona, and if so, was such right violated by the substantially higher rate of compensatory assessment on "GO" fixed by the Secretary in the Final Decision at 34 FR 16548?

3. Is the Plaintiff entitled to protest the application of monies supplied by him and, if so, may those who did not directly or indirectly produce or process "GO" or its ingredients personally pocket the proceeds from the compensatory penalty tax or assessment upon "GO", and may the Plaintiff be required to pay monies on account of such plan without any benefit therefor?

4. If the Court finds the Congress has authorized a violation of the rights set forth at 1-3, may the Act stand as against the Fifth Amendment to the Constitution and other relevant Constitutional provisions, either on the face of its provisions or as

Appendix D — Complaint.

applied to Plaintiff?

XIX

B. STATUTORY MATTERS

1. In view of the legislative history of the Act as interpreted in Lehigh Valley Cooperative Producers v. Freeman, 370 U.S. 76, is the Plaintiff correct in maintaining that the compensatory penalty tax and assessment on "GO" set forth in the Final Decision and Order at 34 FR 16548 is not (as is maintained by the Secretary) saved from the prohibition of 7 USC 608c 5 (G) which provides that the Secretary can not "in any manner limit" the marketing of milk products in a regulated marketing area, by the fact that only fluid uses of non-fat milk powder are so taxed?

2. Is the Plaintiff correct in maintaining that the Secretary's rate of tax or penalty assessment which in 1968 would have resulted in an extra order cost of $.10 per half gallon of "GO" and a total actual incurred cost of $.17 per half gallon of "GO" is a provision which prohibits or tends to prohibit the free entry of non-fat milk powder into the Central Arizona Milk Marketing Area?

3. Is the Plaintiff correct in maintaining that in view of Section 608c 5 (G) of Title 7 USC, and the other applicable provisions of law, the Defendant may not place a condition on Sarival's exemption from market order payments on his fresh milk sales, to-wit: that he not receive, process or manufacture and sell "GO" and providing tolerance limits thereon?

4. Is the Plaintiff correct in maintaining that the Secretary has no jurisdictional powers to price or tax, assess or equalize "GO" as a non-fresh milk product?

5. Is the Plaintiff correct in maintaining that the hearing and pre-hearing procedures of the Secretary are not in conformance with Title 5 USC Sec. 554 et seq.?

6. Is the Plaintiff correct in maintaining that the Secretary, in view of Title 7 USC 608c (11) which favors regional market-

ing orders, may not convene a national hearing and promulgate an order for Central Arizona based on marketing conditions in other areas of the United States and thereafter amend all orders identically including Central Arizona?

7. Is the Plaintiff correct in maintaining that the findings set forth at 34 FR 16548 are not supported by substantial, reliable, probative evidence within the meaning of Title 5 USC Sec. 554 et seq.?

8. Is the Plaintiff correct in maintaining that under Title 5 USC Sec. 554 et seq., the Secretary is not able to relieve the true proposer of the compensatory tax of his burden of proof by agreeing ex parte to adopt and publish the proposal as the Secretary's?

9. Is the Plaintiff correct in maintaining that the Secretary's Decision and Final Order at 34 FR 16548 was not proper or legal as applied?

10. Is the Plaintiff correct in maintaining that the arbitrary method of arriving at class prices under the Order results in a price in excess of the Secretary's authority?

XX

PRAYER FOR RELIEF:

The Plaintiff prays for the following relief:

1. That the Court convene a Three Judge Court to determine the matters in controversy herein and, preliminary thereto, issue a stay of the effective date of the Final Order and Decision at 34 FR 16548 pendente lite until hearing on a stay, temporary injunction or restraining order pendente lite can be held and, thereafter, that a temporary stay, injunction or restraining order pendente lite be issued restraining the effective date of 34 FR 16548 until Final Order and Judgment herein.

2. That the Court declare the rights of the Plaintiff to be as alleged hereinbefore and enter judgment therefor.

Appendix D — Complaint.

3. That the Court issue ancillary writs to such Declaratory Judgment as are necessary to prohibit the implementation of Title 7 USC 608c generally and as proposed at 34 FR 16548, and such other acts as are necessary to preserve the rights so declared.

4. That in addition to the foregoing and as separate relief the Court temporarily and permanently enjoin the Defendant from effectuating 34 FR 16548, or any similar order so providing, or taking any act or step to assert any jurisdiction over or make an assessment upon non-fat milk powder or "GO" pursuant to 7 USC 608c, or any other claimed authority.

5. That the Court grant such other further and different relief as to the Court seems just and proper.

STOCKTON & HING

By _____
Henderson Stockton
507 Security Building
Phoenix, Arizona 85004

HILL & SAVOY

By _____
John E. Savoy
512 Arizona Bank Building
Phoenix, Arizona 85003

Attorneys for Plaintiff

Appendix D — Complaint.

See:

Final Decision,
34 FR 16548, No. 199

Decision on Proposed Amendments,
34 FR 16881, No. 201

Title 7, Agriculture, Order Amending Order,
34 FR 17428

Appendix D — Complaint.

Exhibit B — Affidavit of Marlene L. Kresse attached to Complaint.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MARLENE L. KRESSE, DOROTHY GILBERT, MURIEL DONALDSON, DONALD PARKER, SHARON WILSON, STEVE JUHAROS, Individually and as Officers and Members of Concerned Consumers, an unincorporated association, and on behalf of the class of purchasers and consumers of "GO", a class too large to name individually; and BARBARA BUCK, and PATRICIA RHYNE, consumers of "GO",	CIVIL ACTION #_____
Plaintiffs,	AFFIDAVIT
vs.	
CLIFFORD HARDIN, Secretary of Agriculture of the United States,	
Defendant.	

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

MARLENE L. KRESSE, first being duly sworn, deposes and says:

1. That she is the President of Concerned Consumers, an unincorporated association of consumers who for a number of years has appeared at legislative hearings, circulated petitions and urged action on behalf of consumers by governmental and private groups. Concerned Consumers is currently sponsoring your affiant on a public service radio program for consumer interests 30 minutes once a week on Radio Station XOX in which we advise consumers of their rights and where they need to be vigilant and take action. In addition, Concerned Consumers has sponsored the incorporation of Harbor House

EXHIBIT "B"

Appendix D — Complaint.

Exhibit B — Affidavit of Marlene L. Kresse attached to Complaint.

Inc., a non-profit organization to aid and assist juvenile delinquents and young victims of drugs, and is regularly so engaged in providing a home and rehabilitation for these persons.

2. That we are fully familar with "GO" manufacture and its ingredients, and desire the product. In my case I have been forbidden to consume fresh milk products by my doctor and can only use "GO". It is not practical for me to manufacture it myself and I have considered its availability of prime importance for my health. Further, the right of a consumer to buy a product containing ingredients we desire and whose sale is otherwise lawful is a fundamental right which we will lose on the effective date of the Final Order. We are as equally concerned financially for those of the consumers who desire the product "GO" but who could not afford the extra monies these assessments represent in the event the product were marketed even for a short time.

3. We are firmly and violently opposed to any taxing or assessing arrangement however sophisticated which results in taking money from one businessman and giving it directly to another since it weakens competition and sets the stage for monopoly and higher prices, depriving us of fair competition on a fair basis in the goods we buy and thereby tends to reduce the availability of goods and to enhance the price through restraint upon viable competition. Under present competitive conditions the loss of effective competition from Sarival will inevitably further a monopoly in milk and filled milk and unduly enhance the price.

4. We are equally concerned about the penalty tax or assessment formula of the Department which excludes from regulation margarine made from non-fat milk powder because if it were included,

Appendix D — Complaint.

Exhibit B — Affidavit of Marlene L. Kresse attached to Complaint.

the margarine manufacturers would withdraw monies from the regulation scheme, but which regulation includes "GO" because as a fluid product money is paid into the fund on account of fluid "GO" sales.

5. Unless assisted by the Courts, we, the consumers, are artificially and illegally deprived of a healthful product desired by our members and regularly purchased or will have to in fact pay tribute to fresh milk interests on each quart we buy. There are many poor and underprivileged in Phoenix to whom these items are a matter of necessary nutrition. Many of these people have long since ceased buying milk for their children because of price and "GO" is needed at a reasonable price to assure some wholesome nutrition.

6. That our rights as outlined above and as otherwise alleged have been lost, and more loss will occur unless a stay of the effective date is granted pendente lite and we request such a stay or restraining order at every stage of this proceeding until final determination of this action.

Further affiant sayeth not.

Marlene L. Kresse
MARLENE L. KRESSE

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for the County of Maricopa, State of Arizona, this the 14th day of November 1969.

Dorothy F. Hirsh
Notary Public

My commission expires:
Feb 14, 1972

EXHIBIT "B"

Appendix D — Complaint.

Exhibit C — Affidavit of William J. Rasmussen attached to Complaint.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MARLENE L. KRESSE, DOROTHY GILBERT, MARIE DONALDSON, DONALD PARKER, SHARON MASON, STEVE JUHAROS, Individually and as Officers and Members of Concerned Consumers, an unincorporated association, and on behalf of the class of purchasers and consumers of "GO", a class too large to name individually; and BARBARA BUCK, and PATRICIA REYNE, consumers of "GO",	CIVIL ACTION #_____
Plaintiffs,	AFFIDAVIT
vs.	
CLIFFORD HARDIN, Secretary of Agriculture of the United States,	
Defendant.	

WILLIAM J. RASMUSSEN, first being duly sworn, deposes and says:

1. That he is the founder and sole owner of Sarival Guernsey Farms of Glendale, Arizona, hereinafter called "Sarival". The word "Sarival" herein used is synonymous with the name William J. Rasmussen.

2. That since 1965 Sarival has marketed a food drink made from manufactured, non-fat dried milk powder, vegetable fat, and Vitamins A and D. all of which ingredients currently originate from States wholly outside the State of Arizona, and Arizona water, under the name and style of "GO", to independent grocery stores in the Phoenix, Arizona area only. In turn "GO" is marketed by the stores

EXHIBIT "C"

Appendix D — Complaint.

Exhibit C — Affidavit of William J. Rasmussen attached to Complaint.

to Arizona consumers thereof only. "GO" is the only product so manufactured continuously which has been offered on the Arizona market. In 1968 we sold 1,194,000 half-gallons of "GO", and in 1969 due to a false and abusive publicity campaign against "GO" by the proponent of this tax and penalty assessment in which they falsely represented "GO" to contain saturated fats we sold 665,573 half-gallons of "GO" to November 1969 to grocery stores.

3. That "GO" is also manufactured and sold in chocolate form in which case vitamins are omitted and chocolate, sugar and stabilizer added.

4. That since 1965 heretofore "GO" has been marketed without interference from or regulation by the Secretary of Agriculture and without any penalty tax or assessment of any name or nature.

5. That since 1962, Sarival has also produced fresh milk from Guernsey cows owned by Sarival, and processed and distributed such milk in and about Phoenix, Arizona. In 1968 Sarival marketed 2,084,657 one-half gallons of milk, and in 1969 to November, 1969 1,784,647 half-gallons of milk.

6. That such fresh milk activities of Sarival heretofore have been exempt from Central Arizona, Order #131, covering Phoenix and Tucson, Arizona, by reason of the fact that Sarival distributes its <u>own</u> fresh milk direct to grocers who resell to consumers and thereby is an exempt producer-handler under Central Arizona Milk Order 7 CFR 1131. As an exempt producer-handler Sarival files reports with the Market Administrator, a deputy of the Secretary, but makes no payments to the regulatory scheme on account of such activities. This status will be continued under the Final Order provided we do not make "GO". If we make "GO" we will be assessed on our own fresh milk in addition to the tax and penalty assessment on

Exhibit C — Affidavit of William J. Rasmussen attached to Complaint.

"GO".

7. That none of the fresh milk produced and sold by Sarival is used in any form in "GO". The manufacture and sale of "GO" is as separate products in separate packages and labeling listing the different ingredients. We have surveys showing consumers recognize "GO" as a beverage drink separate from other drinks and that it competes with coffee, tea, fruit drinks, soft drinks, and non-fat milk powder, to a greater extent than it does with milk. One of these surveys is in the hearing record at pages 1519 to 1562. I have personally observed such sales patterns as well. No other similar survey was offered in evidence by any party, and the Final Decision and Order must be otherwise based upon opinion evidence of those who seek to receive the monies assessed, and those retained by such persons.

8. That the regulatory status of "GO" has been under a cloud since December 4, 1966 (31 FR 16277) when the Secretary first published a proposal to regulate the product which culminated in the Final Order and Decision effective December 1, 1969. The matter has taken almost three years to be processed through the Department during which time the marketing of the product and our ability to plan for our business has been severely limited. The present Final Decision further worsens the situation and makes it even more difficult to know how to plan for our business and service our customers.

9. That the costs set forth in the Smilow affidavit are correct and will represent more than 40% of the sale price of the product. The consumers will have to bear the largest share of the charge because even the entire profit margins involved are not

EXHIBIT "C"

Appendix D — Complaint.

Exhibit C — Affidavit of William J. Rasmussen attached to Complaint.

enough to make more than a small contribution to such charges.

10. The Plaintiffs and grocers are threatened with the loss of the product "GO", the only one of its kind on the market, because such a large retail price rise may reduce sales volume to an impermissable level. We have this subject under current evaluation.

11. The "GO" retail market is a specialty market and contains many persons who desire the sole use of non-fat milk powder in a product for convenience, health and other reasons, and the service of this portion of the market enables us and the grocers to maintain our competitive position. Thus, there will be and can be no use made of the fresh milk surplus supplies for which compensatory payment is demanded in the Final Decision and Order. Therefore, absolutely no benefit is derived from the payments to us, the grocers or the consumers.

12. We understand the Secretary to maintain that we are free to buy non-fat milk powder or not for "GO". The tax and economic penalties he has erected will beyond any question result in reduced "GO" sales and the quantities of our non-fat milk powder purchases, and may well force us to cease them altogether. Accordingly, we interpret this decision as leaving us no real choice at all, and to us it says we are required not to buy manufactured non-fat dried milk powder from other States for use in "GO", and that we can not make "GO" and expect to remain in the marketplace.

13. That I have read the Smilow affidavit and adopt it as my own.

14. I support the request for stay as absolutely necessary

Appendix D — Complaint.

Exhibit C — Affidavit of William J. Rasmussen attached to Complaint.

to preserve the status quo and avoid irreparable harm.

Further affiant sayeth not.

William J. Rasmussen
WILLIAM J. RASMUSSEN

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for the County of Maricopa, State of Arizona, this the 17th day of November, 1969.

Notary Public

My commission expires:
Feb. 14, 1972

EXHIBIT "C" - Page 4

Appendix D — Complaint.

Exhibit D — Affidavit of Abe D. Smilow attached to Complaint.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MARLENE L. KRESSE, DOROTHY GILBERT, MURIEL DONALDSON, DONALD PARKER, SHARON MASON, STEVE JUHAROS, Individually and as Officers and Members of Concerned Consumers, an unincorporated association, and on behalf of the class of purchasers and consumers of "GO", a class too large to name individually; and BARBARA BUCK, and PATRICIA RHYNE, consumers of "GO",	CIVIL ACTION #____
Plaintiffs,	AFFIDAVIT
vs.	
CLIFFORD HARDIN, Secretary of Agriculture of the United States,	
Defendant.	

ABE D. SMILOW, first being duly sworn, deposes and says:

1. That he was a member of the Federal Arizona Milk Marketing offices staff for ten (10) years administering the Arizona Federal Order as a principal auditor, and prior thereto was a principal auditor of the New York-New Jersey Federal Milk Marketing Order for 15 years, and is fully familiar with the operation of the said Arizona Order and is fully familiar with the Final Decision and Order complained of by the parties, (34 FR 16548) and has been and is now engaged as a dairy marketing consultant on Federal Milk Marketing Matters.

Appendix D — Complaint.

Exhibit D — Affidavit of Abe D. Smilow attached to Complaint.

2. That Central Arizona Milk Marketing Order 7 CFR 1131 provides for a type of milk market pooling known as an equalization pool. This is one of two types of pools which the Secretary is authorized to operate, the other being an individual handler pool. Under an individual handler pool each milk dealer is required to pay an equal fixed price to his producers only. He makes no payments of any kind to the Milk Marketing Administrator.

3. Under the Arizona equalization pool, payments are required to be made by fluid milk dealers into a fund administered by the Milk Market Administrator, a designated agent of the Secretary for such purposes. These monies are then paid over by the Milk Market Administrator to manufacturing milk dealers. These payments are in essence a subsidy for manufacturers of milk products to reimburse them for monies required to be paid producers. In Central Arizona some of these milk manufacturers are Carnation Milk Company, the United Dairymen of Arizona, a cooperative of milk farmers, and Shamrock Dairies.

4. Under an equalization pool such as Central Arizona's, payments to the Market Administrator are of two essential types. One is a payment on account of fresh milk directly received from farmers regularly supplying the area, and the other is a payment on account of fresh milk received from other sources than farmers regularly supplying the area, and on these supplies the payment is made on a compensatory basis, as if the product had

Exhibit D — Affidavit of Abe D. Smilow attached to Complaint.

indeed been supplied by a regular fresh milk supplier to the market.

5. The Final Decision and Order at 34 FR 16548 subjects "GO", a vegetable fat drink made from out of state, nonfat milk powder to a compensatory assessment, based upon the fluid volume of the completed product, and requires the Market Administrator's equalization plan to be paid for "GO" sales at the rate of the differential between the highest and lowest prices fixed under the order times the volume of "GO" sales.

6. The Final Decision and Order provides a penalty for these supplies being brought into the market as opposed to fresh milk products produced for the market. This occurs by using a larger assessment figure for "GO" nonfat powder than the fresh skim milk products usually associated with the market.

7. Attached hereto is a schedule showing the computation of the sums that would have been due from "GO" in 1968, and 1969 if the contested Order had been effective then. These figures fairly reflect the future impact of the contested Order if not stayed. This schedule further shows that it is greatly more expensive to make filled milk from nonfat milk powder than fresh skim milk, and I have so advised Mr. Rasmussen.

8. The equalization scheme of the Arizona Order as proposed to be amended by the Final Decision and Order will not return the monies paid by consumers and Sarival to the milk producers who produced the milk utilized in the nonfat milk powder.

Exhibit D — Affidavit of Abe D. Smilow attached to Complaint.

These monies will be paid to Arizona fresh milk producers only.

9. The case of Lehigh Valley Cooperative Farmers, Inc. vs. Freeman, 370 U.S. 76, also dealing with equalization compensatory payments at the rate of the difference between surplus price and fluid price contains an excellent discussion of a plan essentially similar to Central Arizona.

10. Since Sarival does not engage in milk manufacturing, it will not receive any monies or credits from the equalization pool. Since "GO" is manufactured from nonfat dry milk powder and not fresh milk, there is no benefit to Sarival or the consumers or grocers from participating in the equalization pool which is essentially for the purpose of providing surplus fresh milk on a stand-by basis and providing a means to equalize the cost. This fresh milk is not used by Sarival who is the only seller in Central Arizona of a vegetable fat drink made wholly from nonfat milk powder and vegetable fat. All others use fresh milk, and have done so during many years prior to the regulation or proposal contested herein.

11. The volume of "GO" sales, when included in the fresh milk regulatory scheme, amounts to approximately one-third (1/3) of one (1%) per cent of the total volume. The inclusion of such a small amount in the regulatory scheme could not affect at all the fixed or blend price which is required to be paid producers.

12. The Final Decision, while it includes in regulation sales of "GO", does not include in regulation nonfat milk powder

Exhibit D — Affidavit of Abe D. Smilow attached to Complaint.

used for manufacturing purposes such as margarine, cakes, pies or other non-fluid uses. Were these uses to be included, the manufacturer would be entitled to a credit and/or withdrawal of monies to the extent that such nonfat milk products were so utilized.

13. That the monetary reserve of the Market Administrator is currently not large enough to insure payment of contingent obligations and those that will accrue hereunder.

Further affiant sayeth not.

Abe D. Smilow
ABE D. SMILOW

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for the County of Maricopa, State of Arizona, this 17 day of November, 1969.

Constance F. Hunt
NOTARY PUBLIC

My commission expires:
Feb. 14, 1972

Appendix D — Complaint.

Exhibit D — Affidavit of Abe D. Smilow attached to Complaint.

SCHEDULE

I

While payments are made monthly under the order plan, the figures below fairly illustrate the relationships although based on annual averages. The following figures based upon the published figures of the Milk Market Administrator contained in the October 1969 price bulletin. This bulletin shows historical prices, and is attached hereto. The volumes stated are based upon Market Administration reports filed by Sarival.

1968:

1. 1,194,000 half-gal. of "GO" sold x $.0954[1] per half-gal. proposed penalty tax and assessment = $113,907.60

2. 2,084,657 half gal. of own farm produced fresh milk sold x $.0236[2] per half gal. penalty for manufacture of "GO" assessed on own farm milk = $49,197.91

Fnt. 1. $3.56 per cwt. Fluid Class I Skim Order fixed price.[A]
1.34 " " Class III Skim surplus Order fixed price[B]
$2.22 Class I-Class III Differential
23.25 half-gal. per cwt. = .0954 per half-gal.

2. $6.71 per cwt. Class I Whole Milk Price
6.16 producer price blended per cwt.
$ .55 per cwt. - $23.25 half-gal. per cwt. = $.0226

A. $6.71 per cwt. Class I whole Milk Price less
3.15 " " value of butterfat not in skim milk
$3.56 Skim Class I

B. $4.03 per cwt. whole milk surplus use price fixed by order
2.69 per cwt. value of butterfat removed
$1.34 skim milk value of order fixed price

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II

1969 TO NOV. 1, 1969

1. 655,573 half-gals. of "GO" sales x $.0976[3] per half-gal. = $64,959.92.

2. 1,764,647 half-gals. of own farm produced fresh milk sold x .0314[4] per half-gal. = $55,409.91

Fnt. 3 - $3.72 Fluid Class I Skim Order fixed price.[A]
1.45 Class III Skim surplus order fixed price.[B]
$2.27 Class I - Class III differential by 23.25 half - gal. per cwt. = $.0976.

A - $6.87 Whole milk fixed price per cwt.
-3.15 value of butterfat removed to make skim per cwt.
$3.72 Fluid Skim Class I Order fixed price.

B - $4.14 order fixed price for Class III surplus whole milk
-2.69 butterfat value removed to make skim
$1.45 Class III Skim differential per cwt.

Fnt. 4 - $6.87 Class I price whole milk per cwt.
6.14 Order fixed price for producers per cwt.
$ .73 Class I Blend Differential per cwt. ÷ 23.25 per cwt. = $.0314 per half-gal.

Appendix D — Complaint.

Exhibit D — Affidavit of Abe D. Smilow attached to Complaint.

III

THE COMPETITIVE DISADVANTAGE TO SARIVAL IN THE USE OF NON-FAT DRY MILK POWDER AS OPPOSED TO USE OF FRESH SKIM MILK IS ILLUSTRATED BELOW: (1)

1968

$2.30	F.O.B. cost of milk powder per fluid cwt. (2)
2.22	Compensatory tax and penalty assessment on "GO" (3)
.93	Cost of loss of exemption on fresh milk sales on account of sales of "GO" ratioed in to half-gal. of "GO" sales (4)
.30	Cost to bring powder to fluid state (5)
$5.75	Total cost to Sarival
-3.56	Cost if fresh skim milk is used rather than powder (6)
$2.19	Total increased cost of powder over fresh skim milk or $.094 per half-gal. of "GO".

Fnt. 1 - Figures in hundred weight.
" 2 - Fluid equivalent of $25.50 per cwt.
" 3 - See footnote - herein
" 4 - Equivalent of lbs. of "GO" sales divided by dollars of exemption value.
" 5 - Per Rasmussen estimate based on average costs for industry
" 6 - Class I Skim milk price

1969 ON SAME BASIS AS 1968:

$2.30	cost of powder at fluid equivalent
$2.27	Compensatory tax and assessment on powder
$1.86	Cost of loss of exemption on fresh milk sales by reason of selling "GO", ratioed in to volume of half-gal. "GO" sales.
.30	Cost to bring powder to fluid state
$6.73	

Appendix D — Complaint.

Exhibit D — Affidavit of Abe D. Smilow attached to Complaint.

III (Continued)

$6.73 -	(from page 8)
-3.72	Cost if fresh skim milk is used rather than powder
$3.01	Total increased cost of powder over fresh skim milk or $.13 per half-gallon of "GO".

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Year and Month	CLASS I PRICE: Basic Formula Price	Add Supply-Demand Adj.		CLASS I MILK: Per 100 lbs.	B.F. Diff.	CLASS II MILK: Per 100 lbs.	B.F. Diff.	CLASS III MILK: Per 100 lbs.	B.F. Diff.	PRODUCER PRICES: Per 100 lbs.	B.F. Diff.
	dol.	dol.	cents	dol.	cents	dol.	cents	dol.	cents	dol.	cents
1965	3.26	2.30	- 2	5.54	8..	3.37	8.9	3.42	8.9	5.00	7.8
1966	3.89	2.30	- 5	6.15	9.0	3.9.	7.7	3.66	7.7	5.60	8.6
1967	4.10	2.43	- 8	6.45	9.0	4.07	7.6	3.82	7.6	5.81	8.6
1968											
Jan	4.05	2.50	-12	6.43 1/	9..	4.06	7.6	3.8	7.6	5.98	8.7
Feb	4.05	2.50	- 9	6.46 1/	9.0	4.06	7.6	3.8.	7.6	5.9[illegible]	8.6
Mar	4.05	2.50	- 9	6.46 1/	9.0	4.06	7.6	3.8.	7.6	5.89	8.6
Apr	4.05	2.50	- 6	6.49 1/	9.0	4.26	7.6	4.0.	7.6	5.86	8.6
May	4.33	2.50	0	6.83 2/	9.0	4.32	7.6	4.07	7.6	6.19	8.7
Jun	4.33	2.50	3/	6.83 2/	9.0	4.31	7.6	4.06	7.6	5.98	8.6
Jul	4.33	2.50	3/	6.83 2/	9.0	4.33	7.6	4.08	7.6	6.27	8.6
Aug	4.33	2.50	3/	6.83 2/	9.0	4.35	7.7	4.10	7.7	6.51	8.6
Sep	4.33	2.50	3/	6.83 2/	9.0	4.43	7.9	4.18	7.9	6.50	8.7
Oct	4.33	2.50	3/	6.83 2/	9.3	4.38	7.7	4.13	7.7	6.44	8.8
Nov	4.33	2.50	3/	6.83 2/	9.1	4.34	7.7	4.09	7.7	6.27	8.7
Dec	4.33	2.50	3/	6.83 2/	9.0	4.42	7.9	4.17	7.9	6.02	8.6
Avg	4.24	2.50	- 3	6.71	9.0	4.28	7.7	4.03	7.7	6.16	8.7
1969											
Jan	4.33	2.50	3/	6.83 2/	9.3	4.34	7.6	4.09	7.6	6.20	8.7
Feb	4.33	2.50	3/	6.83 2/	9.0	4.34	7.6	4.09	7.6	6.18	8.5
Mar	4.33	2.50	3/	6.83 2/	9.0	4.35	7.6	4.10	7.6	6.12	8.5
Apr	4.33	2.50	3/	6.83 2/	9.0	4.40	7.8	4.15	7.8	5.92	8.6
May	4.34	2.50	3/	6.84	9.1	4.40	7.8	4.15	7.8	5.91	8.7
Jun	4.37	2.50	3/	6.87	9.1	4.40	7.8	4.15	7.8	5.79	8.6
Jul	4.39	2.50	3/	6.89	9.1	4.40	7.8	4.15	7.8	6.09	8.7
Aug	4.41	2.50	3/	6.91	9.1	4.41	7.8	4.16	7.8	6.49	8.8
Sep	4.42	2.50	3/	6.92	9.2	4.49	8.0	4.24	8.0	6.61	8.9
Oct	4.49	2.50	3/	6.99	9.4						
				[illegible]	9.13			4.14	7.74	6.14	

1/ Order provided for basic price through April 1968, to be not less than $4.05 per hundredweight.

2/ Order provides for basic price to be not less than $4.33 per hundredweight.

3/ Supply-demand provision of the Order suspended June 1, 1968.

FILE COPY

AUG 20 1972

In the

Supreme Court of the United States

October Term, 1972

Supreme Court, U.S.
FILED
OCT 16 1972
MICHAEL RODAK, JR., CLERK

WILLIAM J. RASMUSSEN, d/b/a SARIVAL GUERNSEY FARMS,

Petitioner-Appellant,

vs.

EARL L. BUTZ, Secretary of Agriculture of the United States,

Defendant-Appellee.

Claim No. 71-1691

for leave to amend pet

Motion and Supporting Affidavit to Add to the Petition for Writ of Certiorari, a Decision of the Second Circuit Court of Appeals reported after filing of the Petition.

JOHN B. CARROLL
918 Onondaga Savings Bank Bldg.
Syracuse, New York 13202
Attorney for Petitioner

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.
(5425)

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Supreme Court of the United States

WILLIAM J. RASMUSSEN, d/b/a
SARIVAL GUERNSEY FARMS,

Plaintiff-Appellant,

vs.

EARL L. BUTZ, Secretary of
Agriculture of the United States,

Defendant-Appellee.

Claim No. 71—1691

Motion to add to the Petition for Writ of Certiorari, a Decision of the Second Circuit Court of Appeals reported after filing of the Petition.

Now comes the petitioner, William J. Rasmussen d/b/a Sarival Guernsey Farm and moves this honorable court for an order amending the Petition for Certiorari filed herein on the 26th day of June 1972 to set forth the decision of the Second Circuit Court of Appeals in the case of *L & M Industries Inc.* vs. *Kenter*, 458 F. 2d 968, at 971, which was published after the filing of Certiorari herein.

JOHN B. CARROLL
918 Onondaga Savings Bank Building
Syracuse, New York 13202

Supreme Court of the United States

WILLIAM J. RASMUSSEN, d/b/a
SARIVAL GUERNSEY FARMS,

Plaintiff-Appellant,

vs.

EARL L. BUTZ, Secretary of
Agriculture of the United States,

Defendant-Appellee.

Claim No. 71—1691

Affidavit of John B. Carroll in Support of Motion to Add to the Petition for Writ of Certiorari.

John B. Carroll first being duly sworn deposes and says as follows:

1. I am attorney for the petitioner herein William J. Rasmussen d/b/a Sarival Guernsey Farms.

2. That I make this affidavit in support of a motion on behalf of the petitioner for an amendment to his Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to set forth a decision of the Second Circuit Court of Appeals rendered April 10, 1972 and reported in the advance sheets subsequent to the filing of the petition herein, in

which the Second Circuit adopted the rule of the District of Columbia that direct access to courts without prior exhaustion of administrative remedies, may be had where an administrative body acts outside its statutory authority (321 F. Supp. 1131, reversed 458 F. 2d 968 (2d Circuit April 10, 1972)).

3. That the petitioner wishes to amend his Petition for Writ of Certiorari to set forth the following language of the case of *L & M Industries Inc.* v. *Kenter* 458 F. 2d 968, 971 which is in conflict with the case on which certiorari is sought.

> Therefore, we find that the FDA exceeded its statutory authority when it determined Bio-Strath Exlixir to be adulterated without first providing the appellant with the opportunity to be heard on that issue. Whenever administrative action exceeds the authority delegated to it by Congress, it is appropriate for an aggrieved person to obtain judicial relief from the impingement of such excess See *Stark* v. *Wickard* 321 U.S. 288,64 S. Ct. 559, 88 L. Ed. 733 (1944); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 66 S. Ct. 637, 90 L. Ed. 718 (1946); *Carl Borchsenius Co.* v. *Gardner*, 282 F.Supp. 396 (E.D. La. (1968)).

4. The Second Circuit's decision in *Kenter* cited *Stark* v. *Wickard* (supra) a case arising under the same Act as the present case for the proposition that judicial relief is available for aggrieved parties where as here an administrative agency is challenged as exceeding its authority as delegated by Congress. However, in the instant case the Ninth Circuit narrowly interpreted the holding in *Stark* by stating that:

> *Stark* v. *Wickard*, 1944, 321 U.S. 288, on which Rasmussen relies, is not in point. There, the party regulated by the offer was a producer, for whom Congress had failed to provide an administrative remedy. In upholding judicial review, the Court relied on the fact that the statute created "definite personal rights" in producers. (321 U. S. at 309) (See Petition for Writ of Certiorari, *Kresse* v. *Hardin* No. 71-1690, Appendix B, Page 17a).

Affidavit of John B. Carroll in Support of Motion to Add to the Petition for Writ of Certiorari.

5. The Second Circuit also adopted the rule followed in the District of Columbia as set forth in the case of *Carl Borchsenius Co.* v. *Gardner* (supra), which cited *Waite* v. *Macy* 246 U.S. 606, 38 S. Ct. 395 and *Hammond* v. *Hull* 76 U. S. Appeals D.C. 301, 131 F. 2d 23.

6. Accordingly a conflict exists as to the application of decisions of the Court between the above Circuits and the Ninth Circuit on the right to direct access to the Court where the act challenged is ultra vires.

WHEREFORE, your petitioner prays for an order of the court allowing the petition for Certiorari to be amended at page 10 to set forth the aforesaid case appearing since filing of the petition and assertion of the conflict among the circuits.

JOHN B. CARROLL

Sworn to before me this
day of 1st August 1972.

ELLA W. BUTTON
Notary Public

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1691

WILLIAM J. RASMUSSEN, D.B.A. SARIVAL GUERNSEY FARMS, PETITIONER

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE

No. 71-1690

MARLENE L. KRESSE, ET AL., PETITIONERS

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Kresse App., pp. 13a-21a) is not yet reported. The opinion of the district court (Kresse App., pp. 1a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1972. The petitions for writs of certiorari were filed on June 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act of 1937 provides that a handler regulated by a marketing order issued pursuant to the Act may challenge that order in an administrative proceeding before the Secretary of Agriculture. 7 U.S.C. 608c(15)(A). The Act further provides that if a handler is dissatisfied with the Secretary's decision, he may then obtain judicial review of that decision in the appropriate federal district court. 7 U.S.C. 608c(15)(B).

The questions presented are:

1. Whether a handler regulated by a marketing order may avoid the administrative proceedings and challenge the order directly in district court without exhausting his administrative remedies.

2. Whether, assuming the handler must exhaust his administrative remedies before bringing suit in his own name, he may nevertheless obtain direct district court review of the marketing order at the instance of an unincorporated consumer group which initiates a suit challenging the order on the same grounds advanced by the handler.

STATUTE INVOLVED

The relevant provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, are set forth in an Appendix, *infra*, pp. 13–14.

STATEMENT

The Agricultural Marketing Agreement Act of 1937 authorizes the regulation of certain agricultural com-

modities, including milk and its products, which move in interstate commerce, through the issuance by the Secretary of Agriculture of marketing orders governing the handling of these commodities. 7 U.S.C. 608c. The Act further provides for administrative and judicial review of a marketing order at the behest of a handler who is regulated by the order in question. Specifically,

> [a]ny handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. 608c(15)(A).[1] If dissatisfied with the Secretary's ruling on the administrative petition, the handler may seek review of "such ruling" in the appropriate district court. 7 U.S.C. 608c(15)(B). No other provisions for the review of marketing orders are contained in the Act.

Petitioner Rasmussen is a milk handler subject to the provisions of the Central Arizona Marketing Order, 7 C.F.R. 1131. He brought this action challenging the marketing order in the district court, explaining his failure to exhaust first the administrative remedy provided by 7 U.S.C. 608c(15)(A) as follows (Rasmussen App. 6a):

---

[1] Pending disposition of his petition for review, the handler may apply for a postponement of the effectiveness of an order or its application to him. 7 C.F.R. 900.70.

> The plaintiff has elected to exercise his rights to commence this proceeding rather than to file for Administrative review pursuant to 7 U.S.C. 608c(15)(A) because the case raises fundamental questions of statutory construction and Constitutional issues which this procedure will expedite and no effective purpose can be served by delay of the issue which will seriously and irreparably injure the Plaintiff and the public.

The complaint generally alleged that, in amending the Central Arizona order in 1969, the Secretary had exceeded his statutory authority and followed procedures which amounted to a deprivation of due process. Rasmussen App. 7a–9a.

At the same time, counsel for Rasmussen filed a second, substantially identical complaint challenging the marketing order on the same grounds advanced by Rasmussen. The plaintiffs in that action were the "Concerned Consumers," an unincorporated association who generally alleged that as a result of the amendments they would have to pay a higher price for a filled milk product manufactured by Rasmussen and regulated under the order. The actions were consolidated and disposed of together by the lower courts.

The district court dismissed Rasmussen's complaint for failure to exhaust the administrative remedy provided in 7 U.S.C. 608c(15)(A), and the court of appeals affirmed. The court based its decision on *United States* v. *Ruzicka,* 329 U.S. 287, where this Court held that review of agricultural marketing orders "in the first instance must be sought from the Secretary of Agriculture," even where legal and constitutional issues are raised. *Id.* at 294.

Petitioner Kresse's complaint was dismissed on the ground that consumers do not have standing to challenge marketing orders. The court of appeals affirmed, noting that Congress had provided for administrative and judicial review only at the instance of handlers regulated by the order involved, 7 U.S.C. 608c(15), and that the structure and purpose of the Act indicated that consumers were not intended by Congress to have standing to seek review (Kresse App. 20a):

> Had Congress intended to allow consumers to attack provisions of a marketing order, it would have required them to pursue the administrative remedy provided in Section 608c (15)(A). By limiting the administrative remedy to handlers, Congress necessarily intended that the judicial remedy be similarly limited in scope.

The court observed that permitting suits by consumers would enable a handler to avoid the statutory administrative remedy by inducing a consumer group to bring suit on his behalf. It pointed out that the "identity of the complaints and of counsel for all appellants in these cases points up the possibility." *Ibid.*

ARGUMENT

1. *Rasmussen.*

The courts below properly dismissed petitioner Rasmussen's complaint for failure to exhaust his administrative remedies. In the plainest terms possible, the Agricultural Marketing Agreement Act conditions the right of a handler to seek review of the legality of a marketing order upon prior exhaustion of the statutory administrative remedy. Section 8c(15) of

the Act, which grants the district courts jurisdiction to review marketing orders, provides an administrative remedy to be invoked by filing a petition with the Secretary; once he renders a decision on the petition, the district courts "are vested with jurisdiction in equity to review such ruling * * *." 7 U.S.C. 608c(15)(B). Another provision vests jurisdiction in the district court to enforce marketing orders upon the Secretary's complaint. 7 U.S.C. 608a(6). Together, these provisions "establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." H. Rep. No. 1241, 74th Cong., 1st Sess., p. 14.

This Court squarely rejected an attempt by a handler to litigate the validity of a marketing order without first exhausting the administrative remedy provided in Section 8c(15)(A) in *United States* v. *Ruzicka*, 329 U.S. 287. After analyzing "the provisions of the Act that distribute enforcement authority between the courts and the Secretary of Agriculture" (329 U.S. at 288), this Court concluded (*id.* at 294):

> Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of his ruling,

and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts.

While *Ruzicka* arose in the context of a handler's defense to an enforcement action, this Court's holding that "the remedy in the first instance must be sought from the Secretary of Agriculture" applies with at least equal force to any suit by a handler seeking initial review from the courts. In either situation, the legislative determination that the Secretary is the exclusive "expert forum" (329 U.S. at 292) for initially contesting marketing orders requires that the district court refuse to entertain any complaint which a handler has not first presented to the Secretary.[2]

Petitioner Rasmussen asserts that this suit is authorized by what he denominates as the Act's "savings clause," 7 U.S.C. 608a(8), which provides that the remedies set forth in Section 8a are "in addition to" other remedies "existing at law or in equity." Rasmussen Pet. 10–12. This Court held in *Ruzicka, supra,* that "that section adds to the Government's remedies.

---

[2] The courts of appeals have consistently followed *Ruzicka*, rejecting in a variety of situations attempts by handlers to litigate the validity of marketing orders without exhausting the administrative remedy. *E.g.*, *Willow Farms Dairy, Inc.* v. *Benson*, 181 F. Supp. 798 (D. Md.), affirmed on opinion below, 276 F. 2d 856 (C.A. 4); *United States* v. *Ideal Farms, Inc.*, 162 F. Supp. 28, 30 (D. N.J.), affirmed, 262 F. 2d 334 (C.A. 3); *United States* v. *Yadkin Valley Dairy Cooperative, Inc.*, 209 F. Supp. 634, 636 (M.D. N.C.), affirmed on opinion below, 315 F. 2d 867 (C.A. 4); *Panno* v. *United States*, 203 F. 2d 504, 508 (C.A. 9); *United States* v. *Turner Dairy Co.*, 166 F. 2d 1 (C.A. 7), certiorari denied, 335 U.S. 813; accord, prior to *Ruzicka: La Verne Co-op Citrus Association* v. *United States*, 143 F. 2d 415, 418 (C.A. 9).

It implies no judicial review in favor of handlers." 329 U.S. at 291, n. 2.

2. *Kresse.*

Petitioner Kresse asserts primarily that the decision below denying standing to consumers to attack the provisions of a marketing order conflicts with the holding in *Harry H. Price & Sons, Inc.* v. *Hardin,* 425 F. 2d 1137 (C.A. 5), certiorari denied, 400 U.S. 1009. In our view, the decisions are in conflict only if *Price* is given the broadest possible reading; even then, we do not believe this case is an appropriate one for resolving the conflict.

The court in *Price* concluded that a tomato wholesaler who was unable to continue his business because of limitations upon tomato marketing imposed by a marketing order had standing to challenge the order under this Court's decisions in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, and *Barlow* v. *Collins,* 397 U.S. 159. In those cases, this Court held that in addition to finding injury in fact, the court must determine whether the plaintiff is "arguably within the zone of interests to be protected or regulated by the statute," 397 U.S. at 153; in addition, "the Court must decide if Congress has in express or implied terms precluded judicial review," 397 U.S. at 165.

In *Price,* the Fifth Circuit resolved the zone of interest issue in favor of the wholesaler, concluding that Price "has been a handler of tomatoes of the kind and size the marketing of which is indirectly affected by the orders and regulations, and it was in the marketing chain of such tomatoes between pro-

ducer and consumer." 425 F. 2d at 1140.[3] It was on this basis alone that the court concluded that Price had standing.

In reaching that conclusion, the Fifth Circuit did not address itself to the additional consideration raised in *Barlow, supra:* whether Congress had implicitly precluded judicial review at the instance of a non-handler when it limited administrative and judicial review of marketing orders to handlers through 7 U.S.C. 608c(15). In our view, for the reasons set forth at length in the government's petition for certiorari in *Hardin* v. *Harry H. Price & Sons, Inc.,* No. 859, O.T. 1970, Congress intended that only handlers be able to challenge administratively, and then judicially, marketing orders issued under the Act.

The court below, addressing itself only to the issue which was not touched on by the Fifth Circuit,[4] con-

---

[3] Thus, Price was found to be within the "zone of interests" of the Act because he was in the "marketing chain," the regulation of which is accomplished through marketing orders. The consumers involved here are not within that marketing chain, and therefore would not appear to be within the zone of interests. The court below expressed doubt that "the Fifth Circuit would extend its holding to consumers." Kresse App. 20a. The court also analyzed the substantive provisions of the Act, noting that "the whole structure of the Act contemplates a cooperative venture between the Secretary, the producers, and handlers." Kresse App. 19a.

[4] This Court's decisions in *Association of Data Processing Service Organizations* and *Barlow* were handed down while the *Price* case was under submission, and therefore the relevance of the decisions was not briefed by either party prior to the Fifth Circuit's decision.

cluded that if Congress had intended to permit consumers to challenge marketing orders, "it would have required them to pursue the administrative remedy," and that by "limiting the administrative remedy to handlers, Congress necessarily intended that the judicial remedy be similarly limited in scope." Kresse App. 20a. The court buttressed this conclusion by noting that (1) the Act does not expressly give consumers any right to participate in any proceeding, and their interest in lower prices is contrary to the Act's purpose of increasing farm prices; (2) permitting consumers to sue directly would enable a handler to avoid the administrative proceeding; and (3) permitting direct suits by consumers would frustrate the plain legislative intent that the Secretary first apply his expertise to the issues concerning the legality of a marketing order. Kresse App. at 19a–20a.

Thus, the decision below does not conflict with the precise holding or with the reasoning in *Price,* for the Fifth Circuit did not consider the factors which the court below found decisive. And, in light of the basis on which the court found standing in *Price,* we think it unlikely it would reach the same result if the issue of consumer standing were before it.

Moreover, we believe that the present case is a particularly inappropriate one for resolving the extent to which Section 8c(15) bars judicial review by nonhandlers in general. The context in which this case arises makes it apparent that the consumer suit was intended, in part at least, to enable the handler to circumvent the requirement that he exhaust his ad-

ministrative remedies. The consumers' allegations are almost *verbatim* those of the handler's complaint, and the suit was brought by the handler's counsel. Both courts below commented that permitting the consumer suit to be maintained would "provide a handler with a convenient device for evading the statutory requirement." Kresse App. 20a, 11a.

In these circumstances, we believe the petition for certiorari should be denied. When the handler files the petition for administrative review of the marketing order, the consumers are permitted to participate through filing a brief and presenting arguments. 7 C.F.R. 900.57. Should the decision be adverse to the handler, he may bring an action in the district court, and the consumers may intervene under the provisions of Rule 24(b), Fed. R. Civ. P. In this way the court's consideration of "the intricate business of milk control" (329 U.S. at 292) would be facilitated by having the administrative decision as to the challenged amendments before it, as Congress intended.

CONCLUSION

For these reasons, the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

E. GREY LEWIS,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
WILLIAM D. APPLER,
Attorneys.

SEPTEMBER 1972.

APPENDIX

The relevant provisions of Section 8c of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 247, as amended, 7 U.S.C. 608c, are as follows:

> (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.
>
> * * * * *
>
> (15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.
>
> (B) The District Courts of the United States in any district in which such handler is an in-

habitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

U.S. GOVERNMENT PRINTING OFFICE 1972

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Nos. 71-1691, 71-1690

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IN THE

Supreme Court of the United States

October Term, 1972

WILLIAM J. RASMUSSEN, D.B.A. SARIVAL GUERNSEY FARMS, PETITIONER

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EARL L. BUTZ, SECRETARY OF AGRICULTURE

On Petitions For Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

JOHN B. CARROLL, Attorney
Carroll & Carroll
918 Onondaga Savings Bank Bldg.
Syracuse, N. Y. 13202

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.
(5524)

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Supreme Court of the United States
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On Petitions For Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONERS

ARGUMENT

The government brief and the Ninth Circuit decision maintain Congress has specifically withdrawn the right to Court review by others than handlers, and as to handlers Congress required they must exhaust administrative remedies.

There is nothing in the act that so provides.

These views turn upon an interpretation of *United States* v. *Ruzicka*, 329 U.S. 287, 67 S. Ct. 207 (1946) which has over the years spawned many children. (Government brief page 7).

From this case the government infers that congress intended handlers challenge actions of the secretary only via adminstrative proceedings.[1]/

It is further reasoned that this being true of handlers, Congress must have intended that others have no right to Court review at all because a right to direct court access would be inconsistent with the exclusive administrative review requirements governing handlers.

These points were urged by the Government upon the Fifth Circuit in *Price* v. *Hardin* 425 F (2) 1137, and upon this court in an application for Certiorari, (Cert. denied 335 U.S. 813) without success.

It appears that Ruzicka which was decided in 1946 before the Administrative Procedure Act, has been left behind in the evolution of the Doctrine of standing, if indeed it was used for the purposes intended.

---

[1]/As pointed out in the Rasmussen Petition page 11-12 the governments interpretation of Ruzicka is out of harmony with the prior decision of *Stark* v. *Wickard,* 321 U.S. 288, 64 S. Ct. 559, and the recent use of *Stark* v. *Wickard* (Supra) by this court in *Zuber* v. *Allen,* 396 U.S. 168, 90 S. Ct. 314, 327 where *this court recognized Stark* (Supra) *and Rock Royal* (*307 U.S. 533, 560, 561, 59 S. Ct. 993, 1006, 1007*) *Rock Royal was an original suit in District Court without prior resort to an adminstrative agency.* Congress itself did expressly provide for the consumer and required the Secretary "to protect" the consumer interest (7 USC 602), and did not itself make mandatory prior to an adminstrative agency, but used at 7 USC 608c 15 (A) the word "may" institute proceeding. By the latter Administrative Procedure Act Congress did supply right of court review not expressly given in the early Agricultural Adjustment Act of 1937. The acts are in harmony, and the requirement of prior handler administrative proceedings before the Secretary is a matter of Court policy.

Certiorari is needed to clarify the role of Ruzicka in light of the newer decisions and to eliminate the conflict in principle between the Circuits.

Certiorari should also be granted because the government when charged on uncontradicted evidence with clearly ultra vires activities, has made no effort whatever to explain or justify to this court the legality of its action. This lack of legality was raised in the Petitions for Certiorari.

Indeed its difficult to see how the secretary could justify his actions since the Congress specifically forbade him from "in any manner" 7 USC 608c 5g limiting the flow of milk products into a marketing area, and this court has heretofor warned the secretary that he must obey this command and cease monopolitic regulations for private benefit. (*Lehigh Valley Cooperative Producers* v. *Freeman* 370 U.S. 93, 82, S. Ct. 1168 (1962) 1177-1180).

The record which stands uncontradicted indicates that he has levied a tax for private benefit equal to 40% of the retail price of the ultimate product which is a mountainous barrier.

This tax will have the obvious effect of limiting the marketing of a competing product. In fact that was its purpose and intent.

It is also important that Certiorari be granted because the within claim arose November 1969 and the Petitioners are faced with a Statute of Limitations of two year duration (See 7 CFR 1000.6 Appendix A attached hereto).

It is therefore, unlikely, despite the government representations at page 7 of their brief, that a future administrative proceedings will be of realistic benefit to either the consumer or handler in this case.

The scope of consumer participation advanced by the government for consumers in general would leave them without the right to initiate an Administrative Review proceeding and therefore without a right of recourse to courts. It would leave them without a right to appeal from any proceeding in which they were allowed as interveneors. It would leave them without the right to make a record, to subpoena of witnesses, or submission of documents and would deprive them the right of cross examination of witnesses. Interveneors rights are limited to briefs and argument (C7 CFR 900.57 Appendix B attached hereto.)

CONCLUSION

For the reasons advanced it is respectfully requested that Certiorari issue.

Respectfully submitted,

JOHN B. CARROLL
918 O.C.S.B. Building
Syracuse, New YOrk 13202

APPENDIX A

§ 1000.6 Termination of obligations.

The provisions of this section shall apply to any obligation under the order for the payment of money:

(a) Except as provided in paragraphs (b) and (c) of this section, the obligation of any handler to pay money required to be paid under the terms of the order shall terminate 2 years after the last day of the month during which the market administrator receives the handler's report of receipts and utilization on which such obligation is based, unless within such 2-year period, the market administrator notifies the handler in writing that such money is due and payable. Service of such written notice shall be complete upon mailing to the handler's last known address and it shall contain but need not be limited to the following information:

(1) The amount of the obligation;

(2) The month (s) on which such obligation is based; and

(3) If the obligation is payable to one or more producers or to a cooperative association (except an obligation to be prorated to producers under an individual handler pool), the name of such producer (s) or such cooperative association, or if the obligation is payable to the market administrator, the account for which it is to be paid;

(b) If a handler fails or refuses, with respect to any obligation under the order, to make available to the market administrator all records required by the order to be made available the market administrator may notify the handler in writing within the 2-year period provided for in paragraph (a) of this section, of such failure or refusal. If the market administrator so notifies a handler, the said 2-year period with repect to such obligation shall not begin to run until the first day of the month following the month during which all such records pertaining to such obligation are made available to the market administrator;

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a handler's obligation under the order to pay money shall not be terminated with respect to any transaction involving fraud or willful concealment of a fact, material to the obligation, on the part of the handler against whom the obligation is sought to be imposed; and

(d) Unless the handler files a petition pursuant to section 8c (15) (A) of the Act and the applicable rules and regulations (7 CFR 900.50 et seq.) within the applicable 2-year period indicated below, the obligation of the market administrator:

(1) To pay a handler any money which such handler claims to be due him under the terms of the order shall terminate 2 years after the end of the month during which the skim milk and butterfat involved in the claim were received; or

(2) To refund any payment made by a handler (including a deduction or offset by the market administrator) shall terminate 2 years after the end of the month during which payment was made by the handler.

APPENDIX B

§ 900.57 Intervention.

Intervention in proceedings subject to this subpart shall not be allowed, except that, in the discretion of the Secretary or the presiding officer, any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to participate in the oral argument and to file a brief.